NO. 347401

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION THREE

CITY OF UNION GAP,

Plaintiff/Appellant,

v.

PRINTING PRESS PROPERTIES, L.L.C.,

Defendant/Respondent

APPELLANT'S REPLY BRIEF

Counsel on Appeal for Plaintiff/Appellant

Bronson J. Brown, WSBA #33673
BELL BROWN & RIO
410 N. Neel Street, Suite A
Kennewick, WA 99336
Telephone: (509) 628-4700
Facsimile: (509) 628-4742
Email: bronson@bellbrownrio.com

P. Stephen DiJulio, WSBA No. 7139
Colm P. Nelson, WSBA No. 36735
FOSTER PEPPER, PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: steve.dijulio@foster.com
Email: colm.nelson@foster.com

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

GLOSSARY

"**Boulevard**" means West Valley Mall Boulevard

"**County**" means Yakima County

"**Deed**" means the quitclaim deed executed by Printing Press to Union Gap, recorded March 21, 2001

"**Driveway**" means the proposed right-in driveway on the Property

"**Development Agreement**" means the Development Agreement between Union Gap and Printing Press, recorded April 7, 2010

"HLA Engineering" means HLA Engineering and Land Surveying

"LAI" means Land Acquisitions, Inc.

"**Lowe's**" means Lowe's HIW, Inc.

"**LUPA**" means Washington's Land Use Petition Act

"MOU" means the Memorandum of Understanding executed by Union Gap and Printing Press, on December 20, 2000

"**NHS**" means National Highway System

"**Printing Press**" means Printing Press Properties, L.L.C.

"**Project**" means the West Valley Mall Boulevard Extension Project

"**Property**" means that real property identified in Appendix A, comprising parcels owned by Lowe's and Printing Press

"**Trial court**" means Superior Court of Washington in and for Yakima County

"**Union Gap**" means City of Union Gap

"Yakima" means City of Yakima

1. INTRODUCTION

Union Gap designed, constructed, and owns the Boulevard, an Intermodal Connector under the National Highway System. As owner, Union Gap has the right to control access to and from the Boulevard for legitimate reasons, such as driver safety. Printing Press has no access rights to the Boulevard. In exchange for $45,000, Printing Press quitclaimed its entire interest in the right-of-way to Union Gap. No easement rights were reserved. But, Printing Press is not left without access. Printing Press's access has always been, and continues to be, from Longfibre Road, an adjacent road that has been greatly improved by Union Gap. And, because Printing Press already has access from Longfibre Road, Printing Press is not entitled to additional access from the Boulevard. Under the very Development Agreement that caused the improved Longfibre Road access, Printing Press has acknowledged Union Gap's authority to control Boulevard access.

Out of concern for public safety, Union Gap properly denied Printing Press's request to build a second driveway access to its Property at a dangerous location. Printing Press challenges Union Gap's decision, arguing that Union Gap is unlawfully regulating outside its jurisdiction. In so doing, Printing Press continues to confuse Union Gap's regulatory authority with its ownership rights, two entirely different concepts, and fails to acknowledge that a city is entitled to control the property it owns, irrespective of whether that property is located within or without the city's jurisdiction. Printing Press disputes Union Gap's ownership of the

Boulevard, an untenable argument when Printing Press itself quitclaimed title to Union Gap. Printing Press mischaracterizes an abutting landowner's right of access, arguing that a landowner is entitled to multiple points of access at the location of its choosing. While Washington recognizes a right of access in certain circumstances, such right is not unfettered, as suggested by Printing Press. To the contrary, when a property owner already has reasonable access to its property, the owner has no right to further access from a particular street.

Similarly, Printing Press misinterprets LUPA. Although Union Gap did not appeal a grading permit issued by Yakima to Printing Press, that does not foreclose Union Gap from controlling access to the Boulevard or automatically vest Printing Press with new easement rights to the Boulevard. LUPA only bars claims that "depend upon" or "arise from" a land use decision and is not as far-reaching as Printing Press suggests. Printing Press's novel interpretation of LUPA is not supported by Washington law.

2. ARGUMENT

2.1 Printing Press Continues to Erroneously Conflate Union Gap's Regulatory Authority and Ownership Rights.

Union Gap demonstrated in its Opening Brief that, while a city cannot exercise regulatory authority outside its corporate limits, "the municipality may exercise its right to own and use property for legitimate city purposes outside its boundaries."[1] *State v. Clausen*, 157 Wash. 457,

[1] Appellant's Opening Brief at pp. 21-24.

460, 289 P. 61, 63 (1930). A city's right to own and control property has been recognized by both Washington courts as well as federal courts. *State v. Clausen*, 157 Wash. 457, 460, 289 P. 61, 63 (1930); *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983); *see also U.S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129, 101 S. Ct. 2676, 2685, 69 L. Ed. 2d 517 (1981) ("this Court recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government."). The distinction between regulatory authority and ownership rights is not "fabricated" by Union Gap, despite Printing Press's claims.[2]

There is no debate over whether Union Gap has authority to own the Boulevard. Washington cities have statutory authority to condemn and own lands located outside of their limits for the express purpose of building and owning a "boulevard." RCW 8.12.030; *see also City of Des Moines v. Hemenway*, 73 Wn.2d 130, 137, 437 P.2d 171, 176 (1968) (affirming *Clausen* but denying marina condemnation where no statutory authority for a marina existed). Where Washington cities have the right to own boulevards located outside their jurisdiction, it necessarily follows, then, that they have the right to control such boulevards. Though, cities must apply discretion in exercising their control, taking measures consistent with "legitimate city purposes." *Clausen*, 157 Wash. at 460.

Union Gap's right to restrict access to the Boulevard does not arise

[2] Respondent's Opening Brief at p. 31.

from Chapter 9.34 UGMC, but rather from its ownership rights. Without Chapter 9.34 UGMC, Union Gap would nonetheless have authority to control access by virtue of its ownership rights.[3] Chapter 9.34 UGMC is simply the means by which Union Gap uniformly exercises both its ownership authority and regulatory authority over its Boulevard.[4] It is not uncommon for cities to control their property in this manner, including property located outside city jurisdiction. *See, e.g.,* Everson, Wash., Mun. Code Ch. 10.16 (2016), http://www.codepublishing.com/WA/Everson/html/Everson10/Everson1016.html. ("No person shall leave any partially dismantled, nonoperating, wrecked, or junked vehicle on any-street or highway within the City, or on City property within or without the corporate limits of the City."); Kirkland, Wash., Mun. Code § 3.68.020 (2005), http://www.codepublishing.com/WA/Kirkland/html/Kirkland03/Kirkland0368.html (governing maintenance of parks "within or without the City limits").

Printing Press misconstrues Union Gap's position, suggesting that Union Gap is asking the Court to determine that the Boulevard is "private property."[5] Union Gap has never made such an argument. Undoubtedly, the Boulevard is public property that, as stated in Union Gap's Opening Brief, may be controlled for "legitimate reasons" consistent with the "use to which it is lawfully dedicated."[6] *Perry*, 460 U.S. at 46. Public property

[3] Appellant's Opening Brief at p. 23.
[4] Appellant's Opening Brief at p. 23.
[5] Respondent's Opening Brief at p. 12 ("the argument is that the road is 'private property'").
[6] Appellant's Opening Brief at p. 21.

has always been subject to the control of the public owner, for legitimate reasons. In this case, the reason is public safety.

Printing Press suggests that "Union Gap is alleging that Yakima does not have jurisdiction over the portion of Valley Mall Boulevard located with Yakima city limits."[7] This is incorrect. Union Gap acknowledges "this very short section of the Boulevard (to the centerline only) is within the Yakima's jurisdiction."[8] What Union Gap argues is that as owner of the road, Union Gap "is vested with broad discretion to control its property for 'legitimate' reasons, such as driver safety."[9] As the Supreme Court has held, "[t]he rule that a municipal corporation cannot exercise its governmental authority outside its limits has nothing to do with the case at bar." *Clausen*, 157 Wash. at 460.

Printing Press suggests that Union Gap provides no Washington authority for the proposition that the principles of "private ownership" apply to public roads.[10] The *Clausen* decision turned on whether the city had the right to own an airport located outside its limits. Because the city was found to ultimately have such authority, it necessarily had the right to control its property. *State v. Clausen*, 157 Wash. 457, 463, 289 P. 61, 64 (1930). Accordingly, that *Clausen* involved an airport outside of Walla Walla's city limits and this dispute involves a boulevard outside Union Gap's limits is of no legal consequence. RCW 8.12.030. The property

[7] Respondent's Opening Brief at pp. 28-29.
[8] Appellant's Opening Brief at p. 22.
[9] Appellant's Opening Brief at p. 22.
[10] Respondent's Opening Brief at p. 32.

right principle enunciated in *Clausen* applies with equal force here; where a city has authority to own property outside its limits, such as a boulevard, it has the authority to control that property.

2.2 The Deed Vests Title in Union Gap, which Designed, Constructed, and Maintains the Boulevard.

Union Gap is owner of the Boulevard. Title vested when Printing Press executed a Deed to Union Gap.[11] As stated in Union Gap's Opening Brief, Union Gap entered into all funding agreements; executed all design and construction contracts; completed all property acquisitions; and, paid all consultant and contractor progress payments.[12] In reference to this disputed section of the Boulevard, Union Gap has been responsible for expenses such as street lighting, street striping, street sweeping, stormwater facility maintenance, and roadside vegetation control. Union Gap also performs snow and ice control, sign maintenance, irrigation, and mows grass medians.[13] While others contributed funding for the Boulevard,[14] there is no ***genuine*** dispute over whether Union Gap acquired, designed, constructed, and currently maintains, the Boulevard.

Despite the fact that Printing Press itself conveyed title in the

---

[11] Amended CP 394-397.
[12] Appellant's Opening Brief at p. 9, Amended CP 786 ¶4, Amended CP 802.
[13] Amended CP 786 ¶5.
[14] Appellant's Opening Brief at p. 9, Amended CP 786 ¶4, Amended CP 802. Printing Press fails to offer any rebuttal to the fact that Union Gap executed all the pertinent contracts for Boulevard, except to note that Yakima conducted "review" of the plans of specifications as part of its Certification Acceptance functions. Respondent's Brief, at p. 14 ¶1. Reviewing documents does not carry the same legal obligations as being a party to the contract. Also, while Yakima did perform some Certification Acceptance functions, the bulk were handled by Union Gap according to WSDOT records. Amended CP 266-273.

Boulevard to Union Gap, on appeal, Printing Press concludes that the "roadway is certainly not 'owned' by Union Gap,"[15] and that "[t]here is simply no credible factual foundation for this contention."[16] In making these conclusions, Printing Press casts a blind eye to the record. The Deed confirms title vests in Union Gap.[17]

Printing Press suggests that Union Gap acquired the land as an agent for Yakima. Printing Press has argued that "[b]ased on the Interlocal Agreement, PPI entered into negotiations with Union Gap with regard to condemnation of a portion of its property."[18] Printing Press cited the declaration of Yakima attorney, Jeff Cutter, who testified that under the aforementioned Interlocal Agreement, "Union Gap acted as 'agent' for City of Yakima."[19]

Yakima is not named on the Deed, and Yakima was not involved in the acquisition of the Printing Press right-of-way. Union Gap's consultant, Land Acquisitions, Inc. ("LAI"),[20] facilitated the acquisition on behalf of Union Gap. LAI kept a diary of its activities in Union Gap's acquisition files.[21] The diary identifies the dates and times the parties negotiated at arm's length, starting on June 14, 2000, and resulting in a Memorandum of Understanding ("MOU") between Union Gap (not

---

[15] Respondent's Opening Brief at p. 13 ¶2.
[16] Respondent's Opening Brief at p. 12 ¶3.
[17] Amended CP 394-397.
[18] Amended CP 673, ln. 7-9.
[19] Amended CP 1046 ¶7.
[20] Amended CP 788 ¶11.
[21] Amended CP 788 ¶11, Amended CP 929-934, (Acquisition/Right of Way Diary).

Yakima) and Printing Press on December 20, 2000.[22]

The MOU was fully negotiated and executed three months ***before*** the Interlocal Agreement was adopted. The sequence of events undercuts Printing Press's argument to the trial court that "[b]ased on the Interlocal Agreement" Printing Press entered into negotiations with Union Gap."[23]

Yakima executed the Interlocal Agreement with Union Gap to moot jurisdictional issues raised by property owners to the east of Printing Press, who were parties to a condemnation lawsuit initiated by Union Gap. Because of time sensitivities, Yakima passed an emergency ordinance approving the Interlocal Agreement. In so doing, both Yakima and Union Gap recognized that the Interlocal Agreement was unnecessary as Union Gap already had condemnation authority under RCW 8.12.030.[24] Nevertheless, given the timing, the Interlocal Agreement was deemed the most efficient approach to moot the jurisdictional arguments.

In support of its agency argument, at the trial court, Printing Press argued that the Interlocal Agreement pertained to the acquisition of its property.[25] Yet, after oral argument and the Court's ruling, Printing Press stipulated that "the Printing Press property is not included in the legal description attached to Ordinance No. 2001-8 [adopting the Interlocal

---

[22] Amended CP 788 ¶11, Amended CP 936, (Memorandum of Understanding dated December 20, 2000).
[23] Amended CP 673 ln. 7-9, Amended CP 936.
[24] Amended CP 1117 ¶2.1 ("both cities believe that the applicable statute authorizes Union Gap to proceed (see RCW 8.12.30)").
[25] Transcript, page 31, ln. 4-11 ("there was a comment made in the argument on the interlocal agreement that the referenced parcels in the City of Yakima didn't include the Printing Press Property. That's just not correct. We've got it in the declarations.").

Agreement]." The ordinance pertains to other property and to a lawsuit to which Printing Press was not a party.[26] The notion that Yakima appointed Union Gap as its agent to acquire land from Printing Press is inconsistent with the record.

The Interlocal Agreement itself confirms that Yakima never appointed Union Gap as its "agent" for any purpose. Yakima "assigned"[27] its rights and authority to Union Gap and, in exchange, Union Gap agreed to indemnify Yakima from claims that arise from the "design, construction, reconstruction, installation, repair, maintenance, operation, alteration, or modification of the Valley Mall Boulevard street and transportation improvements (or other public improvements) on the Property."[28] Nothing in the agreement references Yakima appointing Union Gap as its "agent," let alone with respect to the acquisition of Printing Press property.

Union Gap owns the Boulevard, as evidenced by both the MOU and the Deed vesting title in Union Gap.[29] Ownership is also demonstrated by Union Gap's conduct, including its designing, constructing and maintenance of the Boulevard since its inception. These facts are documented in the record and raised in Union Gap's briefing.[30]

---

[26] Amended CP 1117 ¶2.1.
[27] Amended CP 1121 ¶4.
[28] Amended CP 1121-22 ¶5.
[29] Amended CP 936 and Amended CP 394-397.
[30] Printing Press suggests that "Union Gap has not disputed the agency relationship," (Respondent's Opening Brief at p. 35 ¶2.) or that "[a]t no point did Union Gap offer contravening evidence or dispute these facts." Respondent's Opening Brief at p. 15 ¶2. These statements are wholly inaccurate summations of the record. Amended CP 394-397, Amended CP 788 ¶¶11-12, Appellant's Opening Brief at p. 9, Amended CP 936.

Together, they conclusively establish Union Gap's ownership of the Boulevard.

2.3 The Development Agreement Governs the Entire Property, Not Just the PPI Site.

Under the Development Agreement, the parties agreed that the following language must be included in "all site development plans":

> c. PPI shall incorporate the following access management requirements into all site development plans.
>
> > i. PPI acknowledges that provisions of UGMC Chapter 9.34 may prohibit direct access to Valley Mall Boulevard. Any access to **the property** from Valley Mall Boulevard shall be subject to municipal review and conditioning at time of project permit application.[31]

This language was intended to confirm in future recorded instruments that Union Gap (through UGMC Chapter 9.34) controlled access to the entire "property."[32] By recording the instrument, the acknowledgement expressly puts future buyers on notice of Union Gap's authority. While the term "property" is undefined, it means the entire Printing Press Property, as confirmed by other language in the Agreement. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713 (2014) (the court will "view the contract as a whole, interpreting particular language in the context of other contract provisions."). For instance, the

[31] Amended CP 406 (emphasis added).
[32] Appellant's Opening Brief at p. 11 ¶2.

Development Agreement states that "[t]he PPI Property is currently subject to split jurisdiction between City of Yakima and City of Union Gap."[33] Here, the entire property was "subject to split jurisdiction."[34] Accordingly "PPI property" means the entire Property. Similarly, upon annexation, the Development Agreement states that "the entire PPI parcel will be incorporated into the City of Yakima."[35] The "entire PPI Parcel" therefore means the entire Printing Press Property. Meanwhile, Exhibit B to the Development Agreement identifies the entirety of the property as the "PPI Property."[36] Consequently, where "PPI Property" and "PPI Parcel" refer, each of them, to the entire Property, the term "the property" has the same meaning. This interpretation is consistent with the fact that Union Gap, as owner, controls the entire Boulevard.

Printing Press erroneously argues that the only "property" subject to the Development Agreement is the wedge-shaped piece originally located exclusively in Union Gap and later annexed into Yakima. However, this wedge-shaped land is expressly defined in the Agreement as the "**PPI site.**"[37] If the parties had intended for the access restriction to apply only to the PPI site, they would have said so, and used the defined term PPI site. The very fact that the parties did not use the defined term undermines Printing Press's interpretation and, to the contrary, indicates that the term "property" is something other than the PPI site. Also, as the

---

[33] Appellant's Opening Brief at p. 26, ¶1.
[34] Appellant's Opening Brief at p. 26, ¶1.
[35] Amended CP 405.
[36] Amended CP 414.
[37] Amended CP 405 ¶1.

PPI site is too small to have multiple "site development plans," there would have been no need to reference such plans. The agreement would have read as follows:

> c. ~~PPI shall incorporate the following access management requirements into all site development plans.~~
>
> i. PPI acknowledges that provisions of UGMC Chapter 9.34 may prohibit direct access to Valley Mall Boulevard. Any access to the ~~property~~ PPI site from Valley Mall Boulevard shall be subject to municipal review and conditioning at time of project permit application.[38]

Printing Press overstates the relevance of the PPI Site's legal description being included in the Development Agreement.[39] The legal description was included for two purposes. First, it was included to satisfy RCW 36.70B.170, which requires that the agreement be recorded; and, second, it was necessary to identify the area to be annexed into Yakima.[40] The fact that this legal description is in the Development Agreement provides no support for Printing Press's interpretation of the term "property."

Printing Press next argues that the Development Agreement cannot apply to property outside Union Gap's jurisdiction because that would violate RCW 36.70B.170.[41] Printing Press confuses the purpose of RCW

---

[38] Amended CP 406.
[39] Respondent's Brief at p. 21 and Amended CP 154.
[40] Amended CP 612.
[41] Respondent's Brief at pp. 39-40.

36.70B.170, which expressly authorizes a public body and private party to agree on standards concerning development of the *private owner's property*. Nothing in this authorizing statute prohibits parties, by virtue of their contract authority, from agreeing on conditions concerning use of the *public owner's property*. Just as it is "a proper exercise of county and city police power ***and contract authority***" to agree on development standards concerning a private owner's property, RCW 36.70B.170 (emphasis added), it is equally appropriate for those same parties to agree on conditions of use concerning the public owner's property.

Lastly, Printing Press has never explained why it submitted its first permit application, not to the Yakima but, to Union Gap.[42] Printing Press submitted an application to Yakima only after Union Gap denied the permit.[43] Printing Press's own actions must be scrutinized. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 248, 215 P.3d 990, 1001 (2009) (In interpreting a contract, the Court not only examines "the circumstances surrounding the making of the contract, [but also] the subsequent acts and conduct of the parties to the contract . . ."). Printing Press's actions belie its litigation arguments and suggest that even Printing Press understood that the Development Agreement applies to the entire Property.

---

[42] Amended CP 240 ¶11.
[43] Amended CP 240-241 ¶11.

2.4 Union Gap May Control the Boulevard For Safety Reasons. Risks Arising From a Second Driveway Must not be Discounted.

Union Gap has expressed genuine safety concerns regarding the location of the proposed driveway and the length of its deceleration lane.[44] The location of the driveway is problematic because westbound drivers must cross over a bridge before reaching the driveway, and this bridge obstructs their view.[45] Drivers will have less time to react and stop as they cross over the bridge than they would on a flat surface. Moreover, they will be stopping on a downhill grade.[46] In addition to these issues, Union Gap is concerned that the deceleration lane designed by Printing Press may hold only two vehicles, providing insufficient vehicle stacking distance. As designed, vehicles could back-up into the Boulevard, further shortening the stopping distance and response time of those drivers heading westbound on the Boulevard.[47] Union Gap has cited to the declaration of its Public Works Director, Dennis Henne, who testified that, in the last three years, there have been twenty-nine documented road accidents in this section of the Boulevard.[48] He also testified that Union Gap consulted with HLA Engineering and Land Surveying ("HLA Engineering") regarding the safety risks posed by Printing Press's

---

[44] Appellant's Opening Brief at p. 13 ¶4 and pp. 28-29, Amended CP 786-787 ¶6.
[45] Appellant's Opening Brief at p. 28 ¶3.
[46] Appellant's Opening Brief at p. 14 ¶2, Amended CP 787 ¶7.
[47] Appellant's Opening Brief at p. 13 ¶4 – 14 ¶1, Amended CP 787-788 ¶8.
[48] Amended CP 409 ¶8. Printing Press suggests that Union Gap has "[f]ailed to provide any substantive evidence with respect to purported road accidents in the area." This is another mischaracterization of the record. Mr. Henne's testimony was submitted as substantive evidence and not for purposes of impeachment.

driveway.[49]

In response, Printing Press (1) argues that Union Gap has applied the wrong "standard" governing driveway design (stopping site distance versus passing site distance) and (2) denies that Union Gap consulted with HLA Engineering and Land Surveying.[50] Both arguments lack merit.

Irrespective of whether the correct standard is "stopping site distance" or "passing site distance," or both, the principal concern is that both of these distances will be substantially reduced by vehicles stacking into the Boulevard. It is this risk, coupled with the site-distance concerns, that Printing Press fails to address in any of its briefing.

In implying that Union Gap never consulted with HLA Engineering regarding the Printing Press driveway, Printing Press argues that "no foundation, evidence or testimony was provided to support this hearsay argument."[51] Printing Press again mischaracterizes the record. Union Gap's Public Works Director testified that Union Gap consulted with HLA Engineering regarding this driveway project.[52] Mr. Henne's testimony is not hearsay as it did not include any out of court statements. He simply testified that a consultation took place. *See, e.g., State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) ("A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement.").

---

[49] Appellant's Opening Brief at pp. 28-29.
[50] Respondent's Opening Brief at pp. 10-11.
[51] Respondent's Opening Brief at p. 11, ¶2, Amended CP 996.
[52] Amended CP 240 ¶11.

A Yakima engineer testified that "the only opinion provided by HLA regarding the Lowe's Home Improvement Center development's proposal was that a right-turn access should not be allowed onto the Valley Mall Boulevard."[53] While HLA Engineering did offer its opinion regarding the Lowe's proposal that does not mean, *ipso facto*, that HLA Engineering did not also offer opinion concerning Printing Press's proposal, which was submitted later. In fact, HLA Engineering did consult with Union Gap concerning Printing Press's application, as demonstrated above.[54]

Printing Press suggests that "with respect to road access, it is significant that neither Union Gap nor Yakima have prohibited access to Valley Mall Boulevard."[55] This is another falsity. Union Gap has consistently denied Boulevard driveway access since its construction, denying no less than three requests for private direct access to the Boulevard from property owners in the immediate area.[56]

Union Gap has established that its decision to deny Printing Press's dangerous driveway project was "legitimate."[57] Printing Press's numerous arguments to the contrary fail to establish that Union Gap acted outside the bounds of its authority. Given the broad discretion afforded Union Gap to control its own property, the Court of Appeals should conclude that Union Gap's decision to deny access was a legitimate exercise of its discretion.

---

[53] Amended CP 997.
[54] Amended CP 240 ¶11.
[55] Respondent's Opening Brief at p. 18, ¶2.
[56] Opening Brief, p. 12-13; Amended CP 786-787 ¶6.
[57] Appellant's Opening Brief at p. 24 ¶2 and p. 30 ¶2.

2.5 By Statute, the Deed Conveys Title to Union Gap Free and Clear.

A unique aspect of this case is that Printing Press voluntarily quitclaimed the right-of-way to Union Gap, without reserving any easement rights. The Deed provides that Union Gap takes title "to the same extent and purpose as if the right herein granted had been acquired under Eminent Domain statutes of the State of Washington."[58] Under both the quitclaim deed statute, and the condemnation statute, the grantee takes title free and clear. RCW 8.12.210 ("the title to any property so taken [by condemnation] shall be vested in fee simple in such city or town"); RCW 64.04.050 (any grantor of a quitclaim deed "assigns in fee of all the then existing legal and equitable rights of the grantor in the premises therein described.").

Printing Press has no meaningful response to this, other than to overstate the access rights of abutting property owners, discussed below, and to rely upon inverse condemnation cases. *See, e.g., Walker v. State*, 48 Wn.2d 587, 589, 295 P.2d 328, 330 (1956).[59] In those cases an abutting owner is, on the one hand, denied further access to an existing public way and, on the other hand, denied compensation for the loss of access. *Id.*

The authority relied upon by Printing Press is distinguishable in a couple of significant ways. First, there has never been access to the Printing Press Property from the Boulevard. Before the Boulevard, the

[58] Amended CP 394-397.
[59] Respondent's Opening Brief at pp. 41-43.

right-of-way was raw land. Access has always been from Longfibre Road.[60] Unlike the cases relied upon by Printing Press, Union Gap is not denying existing access, as there has been no access in the first instance. *State v. Calkins*, 50 Wn.2d 716, 719, 314 P.2d 449, 450 (1957) ("there is no taking of [the abutting owner's] easement of access, because such an easement has never in fact existed.").

Second, Union Gap paid compensation for title through a voluntary negotiation. When Printing Press conveyed the right-of-way in exchange for a fee, it enjoyed existing access to its property from Longfibre Road.[61] Accordingly, Printing Press did not reserve any easement rights to the soon-to-be constructed Boulevard.[62] Under these facts, and based on the plain language of the above statutes, Union Gap holds title free and clear of any easement rights. Union Gap is not required to commence a second acquisition or a condemnation to extinguish access rights to property it already acquired (and paid for).

2.6 Printing Press Overstates the "Abutting Landowner" Rule, and Ignores Its Access From Longfibre Road.

In Washington, when abutting property owners already have access to their property, they do not have a right of access from another particular street. Union Gap has cited the following in its Opening Brief:[63]

> Without a denial of access to the property, even abutting owners do not have a property right in a *particular* street . . . . The right of an abutting property owner is the

[60] Appellant's Opening Brief at p. 6, ¶2.
[61] *Id.*
[62] Amended CP 394.
[63] Appellant's Opening Brief at p. 30, ¶3.

> right of access *to the property*, not access to the particular street.

TT Properties v. City of Tacoma, 192 Wn. App. 238, 249, 366 P.3d 465, 471 (2016).

Accordingly, so long as an abutting owner has reasonable access to its property, even if that access is circuitous, the closing of other access is not considered a government taking. *Id.*; *See also Walker v. State*, 48 Wn.2d 587, 591, 295 P.2d 328, 331 (1956) (circuity of route is not a government taking). There is no taking because there is no right to additional access in the first instance. *Id.* This principle, for instance, is codified in the Limited Access Highways statute. RCW 47.52.041 ("No person, firm or corporation, private or municipal, shall have any claim against the state, city or county by reason of the closing of such streets, roads or highways as long as access still exists or is provided to such property abutting upon the closed streets, roads or highways. Circuity of travel shall not be a compensable item of damage.").

This principle is also carried through in UGMC, which states that Union Gap may prohibit access to the Boulevard when abutting owners have alternative access:

> Every owner of property which abuts a controlled access arterial has the right to reasonable access to that roadway, but may not have the right of a particular means of access. The right of access to a controlled access arterial may be restricted if, pursuant to these regulations, reasonable access can be provided to another public road which abuts the property.

UGMC 9.34.030; *see also* UGMC 9.34.060 ("Private direct access to a

controlled access arterial shall be allowed only when other alternatives such as an abutting public street or internal access road are not possible for access.").

Respondent's Brief not only fails to acknowledge that Printing Press has access from Longfibre Road,[64] but also greatly exaggerates the rights of abutting landowners. Printing Press argues that abutting property owners have access to a particular street at the location of their choosing.[65] But, that is not the law of Washington. Abutting owners are entitled to reasonable access, not multiple points of access from a particular street. *Taft v. Washington Mut. Sav. Bank,* 127 Wash. 503, 509-10, 221 P. 604, 606-07 (1923) ("owners of property abutting on a street or alley have no vested right in such street or alley, except to the extent that their access may not be unreasonably restricted, or substantially affected."). Here, Printing Press already has such reasonable access.[66]

Printing Press attempts to differentiate cases like *TT Properties* and *Taft* because the present case "does not involve condemnation, takings or substantial impairment."[67] This is double-speak. Regarding ownership of the Boulevard, Printing Press argues that "the uncontroverted facts are that Union Gap acquired Printing Press property on behalf of Yakima utilizing condemnation authority and procedures."[68] Then, when faced with unfavorable precedent in inverse condemnation cases, Printing Press

---

[64] Amended CP 239-240 ¶9.
[65] Respondent's Opening Brief at pp. 43-46.
[66] Amended CP 239-240 ¶9.
[67] Respondent's Opening Brief at pp. 46-47.
[68] Respondent's Opening Brief at p. 3 n. 2.

argues that this case "does not involve condemnation, takings or substantial impairment."[69] Printing Press cannot have it both ways.

Germane to both this case, and any inverse condemnation case concerning access, is whether the property owner has a right of access in the particular street. *Granite Beach Holdings, LLC v. State ex rel. Dep't of Nat. Res.*, 103 Wn. App. 186, 205, 11 P.3d 847, 858 (2000) ("There can be no inverse condemnation if no property right exists."). Here, the answer is "no."

Printing Press states that the "right of access to Valley Mall Boulevard is recognized in adopted ordinances of both Yakima and Union Gap,"[70] and that "[w]ith respect to road access, it is significant that neither Union Gap nor Yakima have prohibited access to Valley Mall Boulevard."[71] However, Union Gap's ordinance only allows direct access if alternative access is not available, consistent with *TT Properties* and Washington law. UGMC 9.34.030; UGMC 9.34.060.

The trial court expressed concern that if condemnations could extinguish access rights, "condemnations such as this one would automatically extinguish an abutting owner's ability to use the roadway and there is no case law that supports that this theory is correct."[72] Here, the trial court equates the right of access to property with the right of access from a particular street. Union Gap is not prohibiting all access to

---

[69] Respondent's Opening Brief at p. 46.
[70] Respondent's Opening Brief at p. 3.
[71] Respondent's Opening Brief at p. 18 ¶2.
[72] Amended CP 1109.

the Printing Press Property, which seems to be the trial court's concern. In fact, Union Gap greatly improved access for Printing Press when it extended Longfibre Road south.[73] Union Gap is simply denying the additional access sought by Printing Press.

Washington law does not entitle abutting owners to unilaterally dictate the location and scope of their access. If an abutting owner already has access, it has no right to demand more access from a particular street. Because Printing Press currently has complete, fully-developed access to its property from Longfibre Road, it has no right to more access from the Boulevard.

2.7 Printing Press Cannot Secure Easement Rights Through a Strained Interpretation of LUPA.

Historically, LUPA bars claims that "depend on" or "arise from" a land use decision that are not timely appealed. *Asche v. Bloomquist*, 132 Wn. App. 784, 799, 133 P.3d 475, 482 (2006); *Brotherton v. Jefferson Cty.*, 160 Wn. App. 699, 705, 249 P.3d 666, 668 (2011). The claim-bar effects of LUPA are not limitless and are in fact circumscribed. Claims that arise independent of a land use decision are not barred by LUPA. *Asche v. Bloomquist*, 132 Wn. App. at 800 ("Claims that do not depend on the validity of a land use decision are not barred."); RCW 36.70C.040 (LUPA itself only bars untimely "land use petitions").

Printing Press is asking this Court to extend LUPA to bar any claims arising by deed or by contract that are ***related*** to a subsequently-

[73] Amended CP 239-240 ¶9.

issued land use decision, in this case a grading permit.[74] If Printing Press's argument were accepted by the Court, a property owner may gain additional access over a neighbor's property, without the neighbor's permission, by filing a grading permit proposing access over the neighbor's property, just as Printing Press has done here. If the neighbor fails to timely file a LUPA challenge, the neighbor will be foreclosed from subsequently denying access because the right of access ***relates to*** the grading permit. We can find no precedent in Washington interpreting LUPA in this manner. Printing Press's argument, if adopted, would create a dangerous new precedent in an area of the law that has already been subject to criticism for its already-broad application. *See, e.g., Habitat Watch v. Skagit Cty.*, 155 Wn.2d 397, 417, 120 P.3d 56, 66 (2005) (Justice Chambers, Concurring) ("we can go methodically from tree to tree and just get lost deeper in the forest. In this analogy, the trees are precedents and the forest is the legislative purpose in adopting the Land Use Petition Act (LUPA), chapter 36.70C RCW. Getting lost was easy.").

Here, Union Gap has brought claims for breach of development agreement, declaratory judgment, and injunctive relief.[75] The breach of development agreement claim arises from the Agreement itself.[76] The declaratory judgment and injunctive relief claims arise from the threatened demolition and destruction of Union Gap improvements, and trespass onto

[74] Respondent's Opening Brief at pp. 27-31.
[75] Amended CP 10-12, Appellant's Opening Brief at 38-39.
[76] Amended CP 10-11.

Union Gap property, as well as the Development Agreement.[77] Each of these claims arises from contract and property rights that existed ***before*** any grading permit was even contemplated and therefore cannot possibly "depend upon" or "arise from" the grading permit. Yet, Printing Press asks the Court to nonetheless dismiss them.

Printing Press principally relies upon both *Asche* and *Holder v. City of Vancouver*, 136 Wn. App. 104, 108, 147 P.3d 641 (2006). In *Asche*, the Court applied LUPA to bar claims that in fact depended on a land use decision, namely a building permit authorizing construction over a certain height on the applicant's property. *Id.* at 799. Printing Press fails to acknowledge, however, that *Asche* declined to dismiss a private nuisance claim because it did not depend on the validity of a land use decision. *Asche v. Bloomquist*, 132 Wn. App. at 800 ("Claims that do not depend on the validity of a land use decision are not barred.").

Holder is equally unhelpful for Printing Press. There, a *pro se* litigant intentionally abandoned arguments against a hearing examiner's determination that he had violated the municipal code by parking on unimproved surface. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641, 643 (2006). Because the litigant expressly abandoned his appeal, the Court of Appeals dismissed it. *Id.* ("We do 'not consider issues apparently abandoned at trial and clearly abandoned' on appeal."). *Holder* does not come close to expanding LUPA, as suggested by Printing Press.

---

[77] Amended CP 11-12.

In essence, Printing Press is attempting to use LUPA to secure easement rights to the Boulevard, when otherwise it has no such rights. Yakima cannot grant easement rights to the Boulevard by issuing a grading permit for work on Printing Press Property, and Printing Press cannot secure easement rights through a strained interpretation of LUPA. Union Gap continues to have the right to control access to the Boulevard.

3. CONCLUSION

For the foregoing reasons, Union Gap respectfully requests that the Court of Appeals reverse the trial court, grant injunctive and declaratory relief in favor of Union Gap, and award Union Gap its attorneys' fees

RESPECTFULLY SUBMITTED this 2nd day of June, 2017.

FOSTER PEPPER PLLC

By: _____

Colm P. Nelson, WSBA No. 36735
P. Stephen DiJulio, WSBA No. 7139
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: colm.nelson@foster.com
Email: steve.dijulio@foster.com
Special Assistant City Attorneys for the Plaintiff/Appellant City of Union Gap

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on the date set forth below I caused the foregoing document to be served in the manner noted below, and pursuant to the parties' e-service agreement, on the following persons:

Mr. James C. Carmody
Meyer, Fluegge & Tenney, P.S.
230 Sound Second Street
P. O. Box 22680
Yakima, WA 98907-2680
BUSINESS (509) 575-8500
FAX (509) 575-4676
Email: carmody@mftlaw.com
Email: girard@mftlaw.com
Counsel for Defendant/Respondent Printing Press Properties, L.L.C.

☐ via hand delivery
☒ via e-mail
☒ via U.S. Mail

DATED this 2nd day of June, 2017, at Seattle, Washington.

Jan Howell
Jan D. Howell
Legal Assistant

FOSTER PEPPER PLLC

June 02, 2017 - 1:34 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34740-1
Appellate Court Case Title:	City of Union Gap v. Printing Press Properties, LLC
Superior Court Case Number:	16-2-00856-8

The following documents have been uploaded:

- 347401_Briefs_20170602132723D3488986_0370.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was Appellants Reply Brief.pdf

A copy of the uploaded files will be sent to:

- Jan.Howell@foster.com
- bronson@bellbrownrio.com
- carmody@mftlaw.com
- colm.nelson@foster.com
- girard@mftlaw.com
- steve.dijulio@foster.com

Comments:

Sender Name: Jan Howell - Email: jan.howell@foster.com
Filing on Behalf of: Colm Nelson - Email: colm.nelson@foster.com (Alternate Email: litdocket@foster.com)

Address:
1111 Third Avenue, Suite 3000
Seattle, WA, 98101
Phone: (206) 447-4400

Note: The Filing Id is 20170602132723D3488986